

CITY OF NAPA  
CITY CLERKCOMMUNICATION: 25.A. FROM: MICHAEL PATRICK  
DURKEE

Allen Matkins

2010 OCT 18 PM 3:23

Allen Matkins Leck Gamble Mallory & Natsis LLP  
Attorneys at Law  
200 Pringle Avenue, Suite 300 | Walnut Creek, CA 94596-7367  
Telephone: 925.943.5551 | Facsimile: 925.943.5553  
www.allenmatkins.comMichael Patrick Durkee  
E-mail: mdurkee@allenmatkins.com  
Direct Dial: 415.273.7455 File Number: 999903-14000/SF795570.01VIA HAND DELIVERY

October 18, 2010

Dorothy Roberts  
City Clerk  
Napa City Hall  
955 School Street  
P.O. Box 660  
Napa, CA 94559

Re: Appeal of Denial of Above the Bar Proposal No. PL10-0044-UP, DR

Dear Ms. Roberts:

Please accept this appeal on behalf of my client, the Underground Wine Company ("Appellant"), a business located in downtown Napa owned and managed by a Napa Resident.

In conformance with the City's appeal procedures under Napa Municipal Code ("NMC") § 17.70.030(B) this appeal declares:

1. THE SPECIFIC ACTION OBJECTED TO: The Planning Commission's denial of the Use Permit for the Above the Bar Proposal No. PL10-0044-UP, DR on October 7, 2010, which included the adoption of findings denying the Use Permit, Design Review and Sign Permit to authorize the operation of a bar/nightclub in the building that historically had been Fagiani's liquor store and bar, including exterior renovations to the first floor storefront and a third floor addition to the historic building located at 813 Main Street. Project applications included: 1) Use Permits to authorize the use of a bar/nightclub and increase the floor area ratio (FAR), 2) Design Review of the façade renovations and third floor addition, and 3) Sign Permit for an oversized hanging sign. The property is located on the west side of Main Street, approximately 50 feet north of the intersection with Third Street and within the DC- 486, Downtown Commercial General Plan designation and the CD, Downtown Commercial zoning district. (APN: 003-222-008.)

2. ACTION APPELLANT REQUESTS THE CITY COUNCIL TO TAKE: Appellant requests the City Council require the City to follow all proper procedures for the renovation of historic buildings and additions thereto in conformance with City policies. Such City Council action should include an order to the Planning Commission and/or the Cultural Heritage

Allen Matkins Leck Gamble Mallory & Natsis LLP  
Attorneys at Law

Dorothy Roberts  
October 18, 2010  
Page 2

Commission to follow proper procedures under the City's Zoning Ordinance. Further specific requests will be made in the appeal hearing.

3. REASON FOR THE APPEAL: Discretion was not properly exercised because the City did not process the permit applications in the manner required by City ordinances, including, but not limited to, NMC Chs. 15.52, 17.10, 17.62 and 17.70.

4. NAME, ADDRESS AND TELEPHONE NUMBER OF APPELLANT:

*Appellant:*

Underground Wine Company  
1405 Second Street  
Napa, CA 94559

*Appellant's Representative:*

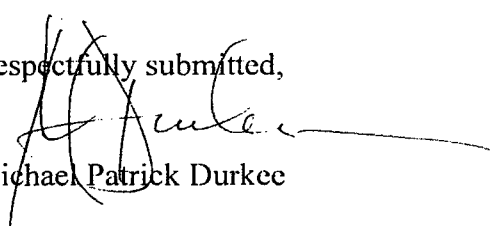
Michael Patrick Durkee  
Allen Matkins Leck Gamble Mallory & Natsis LLP  
200 Pringle Avenue, Suite 300  
Walnut Creek, CA 94596-7367  
(415) 273-7455



Finally, I understand that pursuant to NMC § 17.70.030(D), the earliest date for a City Council hearing on this appeal would be on November 2, 2010. As this is election day, please let me know if you will be holding a City Council meeting that day or, if not, when the hearing likely will be scheduled.

Thank you for this opportunity to submit this Appeal. Please call with any questions or comments you might have.

Respectfully submitted,

  
Michael Patrick Durkee

MPD:afm

cc: Michael Barrett, City Attorney  
Underground Wine Company

# HolmanTeague

real estate law • land use law • business law • climate change law

CITY OF NAPA  
CITY CLERK

October 14, 2010

Dorothy Roberts, City Clerk  
Napa City Hall  
955 School Street  
Napa, California 94559

2010 OCT 16 PM 2:12  
Kevin Teague  
707-927-4272

Teague@htlralaw.com

Received by the City  
Clerk's Department  
Distributed to:

CMgr, CAO, CDD

Re: Above the Bar: City Appeal Procedure

Dear Ms. Roberts,

I write on behalf of individuals who are considering filing an appeal of the Planning Commission's "Above the Bar" decision as it relates to City procedures. While I am only in the initial stages of reviewing their potential claims, I write now to alert you to significant errors I have discovered in the scheduled appeal process.

I understand that the applicant filed his own appeal on October 8, 2010 and that the City Clerk scheduled the hearing before the City Council for October 19, 2010. This timeframe does not comply with Ch. 17.70 of the Napa Municipal Code (NMC), which governs appeals of Planning Commission decisions. The City must correct this immediately, because, as you know, the City's failure to follow its own procedural requirements violates California law and the constitutionally protected due process rights of other individuals who may either file an appeal or testify on this matter.

Regarding appeal scheduling, NMC 17.70.030(D) states:

Appeals shall be scheduled for the earliest regular meeting of the hearing body, not less than 15 days nor more than 45 days after the date of filing an appeal, consistent with the agenda preparation procedures and schedule of the hearing body.

Even if no other appeal is filed after October 8, under NMC 17.70.030(D) the earliest possible date the City could schedule an appeal hearing is November 9, 2010. The days are counted as follows: 15 days after an appeal filed on October 8 is Saturday, October 23; the earliest "regular" meeting (rather than special meeting) after October 23 is the November 9 meeting. As explained below, the City cannot waive or modify this timeframe without a legislative act, requiring adequate notice and process.

The City's police power is described in Article 11, section 7 of the California Constitution, which provides: "A county or city may make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws." Once that local police power is exercised to make local law -- such as the adoption of a local ordinance or other local regulation -- that adopted law must be adhered to by the City until such time as the City again uses its police power to amend or repeal that local law.

Here, the City exercised and exerted its police powers when it crafted and adopted ordinances governing a wide variety of topics, including its own administrative appeal process. A City cannot ignore those binding ordinances. Under California law, it is "an elementary proposition not open to doubt" that the City Council must follow its own Code when processing and considering an administrative appeal. (*City and County of San Francisco v. Superior Court* (1960) 53 Cal.2d 236, 250; *see also Johnston v. Board of Supervisors* (1947) 31 Cal.2d 66, 74 ["When a [City Council] acts in an administrative capacity, as in granting permits under a zoning ordinance, it is bound by the terms of the ordinance until the ordinance is amended through proper legislative procedure."].)

When a legislative body such as the City Council functions in an appellate capacity, state law expressly requires that the City's appellate procedures comply with local ordinances such as the NMC 17.70.030(D). (*See State Planning and Zoning Law* (Gov. Code §§ 65000 *et seq.*) *See, e.g., Candid Enters., Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal.3d 878, 885.) If the City no longer supports the strictures of its own procedural ordinances, it has the power to amend or repeal them through the proper procedures. But, it cannot ignore them on an *ad hoc* basis when convenient. *See Cohan v. City of Thousand Oaks*, 30 Cal.App.4<sup>th</sup> 547, at 560 (1994)(also stating that cumulative procedural errors committed by a city impaired the adequacy of the appeal hearing violating their own due process requirements).

This legal principle applies to waiver of these timelines. Absent an express provision of the local ordinance that allows a waiver or modification to the timelines required by NMC 17.70.030(D), the City cannot, under *Cohan* and the other laws cited above, ignore the procedures because they are asked to. This violates the public's protected rights to due process. *See Horn v. County of Ventura*, 24 Cal. 3d 605, 612 (1979). Even if there is a strained attempt at an interpretation of the law that would vainly justify ignoring the rules, it is not appropriate for the City to risk the public's due process rights and to risk taxpayer dollars to defend claims of due process violations that can be avoided by merely following the rules.

Next, regarding the appeal filing deadline, NMC 17.70.030(A) provides:

Appeals must be received by the Community Development Director or City Clerk not later than 10 calendar days following the date of action from which appeal is being taken. If the 10th calendar day is a weekend or a city holiday, the deadline is extended to the next working day.

Under this section, any aggrieved party has until October 18 to file an appeal. Then, pursuant to NMC 17.70.030(C), the City has "three working days" to determine if the appeal is complete and the appellant has another "five working days" to cure any defect. Counting the days, this means that October 28 would be the end date for filing appeals (which means the theoretical date for a hearing would be November 16). Under the City's

Dorothy Roberts, City Clerk  
October 14, 2010  
Page 3 of 3

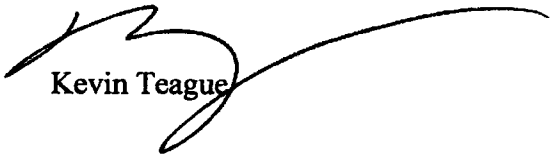
reported schedule, the hearing will be held nine days prior to the technical close of the filing period. Scheduling a hearing (let alone holding one) prior to the end of the filing period is inconsistent with NMC 17.70.030 and procedural due process rights of the public or any other interested party.<sup>1</sup>

The remedy is simple. Adhering to the Code and obeying the timeframes proscribed by the law will cure this procedural or the risk of procedural error and will avoid the embarrassment and expense of spending taxpayer dollars to defend claims and hold another, compliant hearing.

I appreciate your attention to this matter. I will keep you informed as I proceed with my review. Please feel free to call with any questions.

Sincerely,

Holman Teague Roche Anglin LLP



Kevin Teague

cc: Michael Barrett

---

<sup>1</sup> Similarly, because the City Council hears appeals *de novo* (meaning that they open the hearing to testimony by the public even if not a party to the appeal), persons interested in adequately preparing and testifying would have due process claims, among others, against the City's for the City's failure to follow its own procedural requirements.